

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN, UNDER ARBITRATION ACT. No 30 of 1998

with

PETITION UNDER ARBITRATION ACT NO.31 OF 1998

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR. C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

OMKAR CONSTRUCTION CO.

Versus

UNION OF INDIA

Appearance:

MR GR MALHOTRA for Petitioner

MR MUKESH A PATEL for Respondent No. 1

CORAM : ACTG.CHIEF JUSTICE MR. C.K.THAKKAR

Date of decision: 05/11/1999

ORAL JUDGEMENT

These applications are filed for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). Notice was issued by this Court pursuant to which the respondents have appeared.

I have heard at length learned counsel for the parties.

Learned counsel for the petitioners submitted that inspite of notices issued by the applicants, the matters are not referred to arbitrator and hence, the Chief Justice can issue appropriate direction under section 11 of the Act.

On the other hand, Mr. Patel for the Union of India contended that the matter is time barred and hence it cannot be referred to arbitrator. He invited my attention to Clauses 63 and 64 of the General Conditions of Contract. Clause 63 provides that all disputes and differences arising out of or in connection with the contract will be referred to arbitrator. Clause 64 makes provision for demand for arbitration. Clause 64 (1) (iii) is material which reads as under :

"(iii) If the contractor (s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the railway shall be discharged and released of all liabilities under the contract in respect of these claims".

It was submitted on the basis of affidavit in reply that final bill was prepared on May 30, 1995 and "no objection certificate" was filed by the petitioner after verification and satisfaction and he accepted the final bill. He also collected the amount and for the first time, he raised a dispute on November 18, 1996. The dispute was thus raised beyond the period of limitation and, therefore, it was not tenable at law.

So far as no objection certificate said to have been issued by the petitioner is concerned, the same is not produced on record.

The question is, as to whether such dispute can be decided by Chief Justice by dismissing the application holding it to be time barred. In my opinion, the answer must be in the negative. As early as on 1967, in Wazir Chand vs. Union of India, AIR 1967 SC 1990, the question before the Supreme Court was whether it was open to the court to reject the application under Section 20 of the Arbitration Act, 1940 (old Act) on the ground that claim had not been made within three years as provided under

the Limitation Act.

The Supreme Court observed as under :

"In dealing with an application for filing an arbitration agreement, the court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit and also that a dispute has arisen with regard to the subject matter of the agreement which is within the jurisdiction of the court. But the court is not concerned in dealing that application to deal with the question whether the claim of a party to the arbitration agreement is barred by the law of limitation' that question falls within the province of the arbitrator to whom the dispute is referred." (emphasis supplied).

Mr Malhotra submitted that the Chief Justice is concerned only if contract or agreement provides for arbitration clause and whether a dispute has arisen between the parties. If two conditions are been fulfilled, the matter must be referred to arbitrator and it is for the arbitrator to consider all contentions available to the parties and to decide them in accordance with law. He also relied upon the following authorities:

- (1) Major (retd) Inder Singh Rekhi vs. Delhi Development Authority, (1988) 2 SCC 338;
- (2) Joginder Singh vs. Union of India, 1998 (2) Arb.L.R. 512
- (3) Medunarsimholu vs. Council of Scientific and Industrial Research, New Delhi, AIR 1999 AP, 345.

Mr. Patel submitted that if question goes to the root of the matter, it can be decided by this Court and as the matter cannot be referred to arbitrator, applications are misconceived and they are required to be rejected at the threshold.

In my opinion, the petitions deserve to be allowed. As held by the Supreme Court, in Vazir Chand, the jurisdiction of the Court or the Chief Justice is to

satisfy about existence of written agreement which is valid and subsisting and existing between the parties. Once these conditions are fulfilled, the Chief Justice is not concerned with the question whether the claim put forward by the petitioner is barred by law of limitation as the said question falls within the province of arbitrator to whom the dispute is referred.

Recently, in Arbitration Petition No.29 of 1998 decided on October 22, 1999, I have taken a similar view.

For the foregoing reasons, in my opinion, both the petitions deserve to be allowed and are accordingly allowed. Respondents are directed to appoint arbitrators in accordance with provisions of Clause 64 (3)(ii) of the general conditions of contract . Since the matter is very old, respondent authorities are directed to comply with the above directions as expeditiously as possible preferably on or before December 31, 1999. No order as to costs.

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